82-1312

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UTAH POWER & LIGHT COMPANY and
THE MONTANA POWER COMPANY, *Petitioners*,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Licenses to construct and operate hydroelectric facilities are issued by the Federal Energy Regulatory Commission pursuant to Part I of the Federal Power Act. By January, 1980, there were some 490 major hydroelectric generating projects, located in 32 states, under license to private entities. The replacement value of those facilities is over $21 billion. Because the Act establishes a maximum 50 year license term, a number of original licenses have expired and many more will expire over the next several years. Section 15(a) of the Act authorizes issuance of a new license to the "original licensee" or, alternatively, to a "new licensee." Section 7(a) of the Act provides that in issuing licenses to "new licensees" pursuant to Section 15, State and municipal applicants receive a statutory preference. The question presented here is:

> Does the preference provided in Section 7(a) of the Act for a State or a municipality apply in a relicensing proceeding under Section 15 of the Act against an *original* licensee that is neither a State nor a municipality?

PARTIES TO THE PROCEEDING BELOW

A list of all parties to the proceeding below and the petitioners' subsidiaries and affiliates is contained in petitioners' appendix (Pet. App.) at 85a.

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Utah Power & Light Company and The Montana Power Company petition for a writ of certiorari to review the judgment below of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, reported at 685 F.2d 1311 (11th Cir. 1982), is set forth in the petitioners' appendix (Pet. App.) at 1a. Federal Energy Regulatory Commission Opinion No. 88, "Opinion and Order Declaring Municipal Preference Applicable to Hydro-Electric Relicensings" (Opinion 88), issued June 27, 1980, is reported at 11 F.E.R.C. (CCH) ¶ 61,337, 20 Fed. Power Serv. (MB) 5-921, and is

set forth at Pet. App. 14a. Commission Opinion 88-A and Order Denying Rehearing (Opinion 88-A), issued August 21, 1980, is reported at 12 F.E.R.C. (CCH) ¶ 61,179, 21 Fed. Power Serv. (MB) 5-332, and is set forth at Pet. App. 79a.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1982, and is reprinted at Pet. App. 81a. A petition for rehearing and a suggestion for en banc consideration were denied without opinion on November 12, 1982. 693 F.2d 135 (11th Cir. 1982), Pet. App. 83a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES

Pertinent portions of the Federal Water Power Act (FWPA), ch. 285, 41 Stat. 1063 (1920), as enacted, are set forth at Pet. App. 87a. The FWPA became Part I of the Federal Power Act in 1935, Public Utility Act of 1935, ch. 687, Title II, 49 Stat. 803, 838-47 (1935), and was subsequently amended in several respects. Relevant sections of Part I of the Federal Power Act, *as amended*, 16 U.S.C. §§ 791-823a (1976), are set forth at Pet. App. 101a. The term "Act" is used herein to refer to both of these statutes.

STATEMENT

THE ISSUE

The controversy in this case involves the proper interpretation of the italicized language in Section 7(a), 16 U.S.C. § 800(a) (1976), of the Act:

> In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and *in issuing licenses to new licensees under section 15 hereof* the commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the commission equally well adapted, or shall within a reasonable time to be fixed by the commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region.
> . . .

Petitioners contend that the express cross-reference in Section 7(a) to Section 15 leaves no doubt that Congress intended the term "new licensees" in Section 7(a) to have the same meaning it has in Section 15; that is, a "new licensee" is an entity other than the "original licensee."[1] It is undisputed that Congress used the term "new licensee" in Section 15, as well as in Section 22, for the specific purpose of referring to applicants for a new license other

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[1] Section 15(a), 16 U.S.C. § 808(a) (1976), provides:

> That if the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof, *the commission is authorized to issue a new license to the original licensee* upon such terms and conditions as may be authorized or required under the then existing laws and regulations, *or to issue a new license under said terms and conditions to a new licensee*, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the *new licensee* shall, before taking possession of such project or projects, pay such amount as the United States is required to do, in the manner specified in section 14 hereof: *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a *new licensee*, or issue a new license to the original licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid.

(Emphasis supplied.)

than the original licensee.[2] If, as petitioners argue, Congress intended the term "new licensees" to have the same meaning in Section 7(a) that it has in every other place it appears in the statute and throughout the legislative history, then the only reasonable interpretation of the phrase "in issuing licenses *to new licensees* under section 15 hereof" is that Congress intended to apply the municipal preference solely against applicants *other than* "original licensees." Petitioners contend that this interpretation: 1) is required by the language of the statute, 2) is consistent with the legislative history, and 3) produces a reasonable result.

The Federal Energy Regulatory Commission[3] interpreted the term "new licensees" as used in Section 7(a) to mean *any* applicant for a new license, *including the "original licensee,"* because the Commission believed Congress intended that the municipal preference apply against all private applicants for a new license. The Commission found that: 1) there is no reason to interpret the term "new licensees" in Section 7(a) to mean the same thing it means in Sections 15 and 22 of the Act; 2) the Wilson Administration intended the municipal preference to apply against original licensees, and 3) petitioners' interpretation produces absurd results. *See infra* at 7-11.

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[2] It is also undisputed that in amending the Act in 1968, Congress used the term "new licensees" in Sections 7(c) and 15(b) to distinguish between "original licensees" and other applicants.

[3] Section 402(a)(1) of the Department of Energy Organization Act, Pub. L. No. 95-91, § 402(a)(1), 91 Stat. 565, 583-84 (1977), transferred the administration of Part I of the Federal Power Act from the Federal Power Commission to the newly-created Federal Energy Regulatory Commission. The term "Commission" is used herein to refer to both of these agencies.

As the Commission noted, the case presents a purely legal question:

> Within the framework of this proceeding established by our order of May 3, 1979, we view our present role as being the same as that of the District of Columbia Circuit in *Chemehuevi Tribe of Indians* v. *Federal Power Commission, infra.* In other words, the principal question to be decided is not the policy issue of whether it is factually or politically wise for States and municipalities to have a relicensing preference against citizen and corporation licensee-applicants, but the legal issue of whether Congress included such a preference in Section 7 when it enacted the FWPA in 1920.[4]

STATUTORY BACKGROUND

The Federal Water Power Act of 1920 was enacted to encourage the investment of private capital to develop and utilize the vast energy production potential of the nation's hydropower resources. *See Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395, 407 (1975). The FWPA established a licensing program for authorizing non-Federal hydroelectric development on Federal lands and navigable streams, while maintaining Federal regulatory oversight to ensure that such projects are built and operated in the manner which best serves the public interest.

The Commission may, under Section 4(f), 16 U.S.C. § 797(f) (1976), issue preliminary permits which grant the permittee a priority in subsequent licensing proceedings

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[4] Opinion 88 at 10, Pet. App. 24a. The Eleventh Circuit agreed:

> We are faced with a purely legal question regarding the statutory construction of section 7(a) of the Federal Power Act. . . .

Alabama Power Co. v. FERC, 685 F.2d 1311, 1312 (11th Cir. 1982), Pet. App. 1a (citation omitted).

for hydroelectric development under Section 4(e), 16 U.S.C. § 797(e) (1976). The Commission may license only that project which is "best adapted" to a comprehensive utilization of the water resource, subject to any conditions necessary to serve the public interest. Section 10(a), 16 U.S.C. § 803(a) (1976). Licenses may be issued for a maximum of 50 years. Section 6, 16 U.S.C. § 799 (1976).

Section 7(a), 16 U.S.C. § 800(a) (1976), provides States and municipalities[5] a preference when competing with private citizen and corporate applicants: 1) in issuing preliminary permits, 2) in issuing licenses where no preliminary permit has been issued, and 3) in issuing licenses "to new licensees" upon expiration of original licenses. Section 7(a) further provides that as between other applicants, the Commission is authorized—consistent with the standard of Section 10(a)—to prefer the proposal "best adapted" to serve the public interest.

Upon the expiration of original licenses, several options are available, including Federal takeover pursuant to Section 14, 16 U.S.C. § 807 (1976), and relicensing, through issuance of a new license either to the original licensee or to a new licensee pursuant to Section 15, 16 U.S.C. § 808 (1976).[6] Section 14(b) requires the Commis-

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[5] "Municipality," as defined in Section 3 of the Act:

> means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power.

16 U.S.C. § 796(7) (1976). States and municipalities are hereinafter collectively referred to as municipalities.

[6] Section 15 also provides for issuance of annual licenses to allow continued operation of the project pending its ultimate disposition.

sion to "entertain applications for a new license and decide them in a relicensing proceeding pursuant to the provisions of section 15."[7]

COMMISSION PROCEEDINGS AND OPINION 88

Upon expiration of its original license for its Weber Project, Utah Power & Light Company applied for a new license, and the City of Bountiful, Utah filed a competing application for Utah Power's project. The City of Bountiful then petitioned the Commission for a declaratory order that municipal applicants are entitled to a statutory preference over private original licensees in Section 15 relicensing proceedings. The City of Santa Clara's similar petition was consolidated with Bountiful's petition. By order issued May 3, 1979, the Commission established the scope of the proceeding, granted petitions to intervene by interested parties, and set the matter for briefing.[8] Following oral argument, the Commission issued Opinion 88 on June 27, 1980, holding that when Congress enacted the FWPA, it intended to provide a municipal preference over private original licensees. Opinion 88 at 58, Pet. App. 74a.

Although the Commission characterized the issue before it as purely "legal" and likened its role to that of a court, its starting point in interpreting the statute was the legislative history—a history which it described, on rehearing, as "occasionally opaque"—rather than the language of the statute. In its analysis of the legislative

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[7] Section 14(b) was added by the Act of Aug. 3, 1968, Pub. L. No. 90-451, 82 Stat. 616-17 (1968).

[8] Federal Energy Regulatory Commission, Order Granting Interventions and Setting Briefing Schedule (Order) (FERC Docket No. EL78-43) (May 3, 1979), reprinted in Pet. App. 118a.

history, the Commission (Opinion 88 at 47-49, Pet. App. 61a-64a):

> (1) acknowledged that the municipal preference provision, as originally introduced in 1918, contained "no words expressly including . . . successor licenses";
>
> (2) contended that the municipal preference nevertheless "clearly applied to the issuance of all successor licenses," albeit "silently";
>
> (3) opined that this silent relicensing preference "became obscured through the successive amendments" to the bill;
>
> (4) found that the municipal preference nevertheless "continued to apply silently to all successor licenses"; and
>
> (5) concluded that "[t]he words [in issuing licenses to new licensees under Section 15 hereof] were added to express the same municipal preference with respect to successor licenses that was in Section 7 silently immediately before its amendment."

When the Commission turned from the legislative history to the statute's language, it interpreted the term "new licensees" to include "original licensees" notwithstanding the contrary meaning of the term in Sections 15 and 22.[9] The Commission found that "there is no reason to require the term new licensees" to have the same meaning in Section 7 as it has in Sections 15 and 22. The Commission's rationale was that the term "original licensee" as used in Section 8, has a different meaning

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[9] The Commission gave no weight to the express cross-reference from Section 7(a) to Section 15 and never discussed the extensive and consistent use of the term "new licensees" to exclude "original licensees" in Congressional debates. *See infra* at 24.

from its meaning in Sections 15(a) and 22, and thus there was no need to interpret the term "new licensees" consistently.[10] Petitioners invite the Court's particular attention to the Commission's analysis of the language of the statute. Opinion 88 at 41-47, Pet. App. 54a-61a.

The Commission attempted to bolster its conclusion that the preference applies against original licensees with a discussion of the "effects" of the two conflicting interpretations advanced by the parties. According to the Commission, petitioners' interpretation produces "absurd results."[11]

The Commission next addressed the fact that in 1967, in recommending legislation relating to relicensing, it advised the jurisdictional committees of Congress that it interpreted the municipal preference to apply solely against new licensees. As the Commission acknowledged, a majority of the Senate Commerce Committee informed

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[10] Opionion 88 at 46, Pet. App. 59a-60a. Petitioners contend that the Commission's analysis of the meaning of the term "original licensee" is wrong. Moreover, even if the Commission's interpretation of "original licensee" were correct, it does not follow that the Commission's decision to interpret the term "new licensees" inconsistently is justified. *See infra* at 21-23.

[11] The Commission did *not* hold that applying the municipal preference against private original licensees was an absurd result. Rather, the Commission assumed that petitioners' interpretation might lead to results which the Commission thought to be absurd, *e.g.*, 1) a *municipal* original licensee would receive no preference over private applicants in a relicensing proceeding, and 2) the Commission would be required to undertake a "two-step" proceeding. Opinion 88 at 51-52, Pet. App. 65a-67a. The Commission's characterization of petitioners' interpretation and of the results of that interpretation is wrong. Petitioners neither advocate, nor does their interpretation produce, the results which the Commission found to be absurd. *See infra* at 27-29.

Congress of its agreement with the Commission's 1967 conclusion that: 1) the municipal preference does *not* apply against original licensees, and 2) legislation extending the preference to apply against original licensees would not be desirable. But the Commission in Opinion 88 gave no weight either to its own prior interpretation or to the endorsement by the Committee's majority of that interpretation in the Senate Commerce Committee Report.[12]

The Commission subsequently denied petitions for rehearing, admitting its difficulty in supporting the con-

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[12] *See* Opinion 88 at 32-39, 53-55, Pet. App. 45a-52a, 68a-71a. The House and Senate Committees received extensive testimony on the precise issue presented in this case. In a written statement, the Chairman of the Federal Power Commission advised both Committees that the municipal preference in relicensing did not apply against the original licensee, and continued:

> In preparing the draft legislation we rejected the suggestion that the statutory preference should be extended so as to apply to a contest for a new license between an original licensee and a party who, in the case of a contest for an unconstructed project, is entitled to preference. Similarly, we rejected the recommendation that a statutory preference should be established in favor of the original licensee.

United States Relicensing or Recapture of Licensed Hydroelectric Projects: Hearings on S. 2445 Before the Senate Commerce Comm., 90th Cong., 2d Sess. 19 (1968); *Authority of FPC to License and Take Over Hydroelectric Projects: Hearings on H.R. 12698 and H.R. 12699 Before the Subcomm. on Communications and Power of the House Interstate and Foreign Commerce Comm.*, 90th Cong., 2d Sess. 23 (1968).

Opinion 88 quotes from the Senate Commerce Committee Report, *inter alia*, the statement that (Opinion 88 at 35, Pet. App. 48a):

> "Your committee was impressed by the testimony of the Federal Power Commission concerning its interpretation of the law in this [relicensing] area and the policy it now applies to implement the law."

clusion it reached in the original order (Opinion 88-A, Pet. App. 80a):

> As we indicated in Opinion No. 88, nothing in either the intrinsic or the extrinsic evidence on the meaning of Section 7(a) is clearly dispositive of the question before the Commission. The Commission has, in Opinion No. 88, attempted to give full effect to the general purpose of Section 7(a), in the context of Part I of the Federal Power Act, and reflected then on the lengthy and occasionally opaque legislative history.

Several private original licensees filed petitions for judicial review pursuant to Section 313(b) of the Act, 16 U.S.C. § 825l(b)(1976).

ELEVENTH CIRCUIT PROCEEDINGS AND OPINION

The court's seven page opinion framed the controversy as a purely legal one requiring a choice between two conflicting interpretations of the term "new licensees" as used in Section 7(a). The court summarily concluded, without analysis, that both of the conflicting interpretations are "reasonable," that the meaning of "new licensees" is therefore ambiguous, and that it is consequently appropriate to consult the legislative history. 685 F.2d at 1316, Pet. App. 9a. Before the court turned to that legislative history, however, it adopted the Commission's conclusion that petitioners' interpretation, although reasonable, produces absurd results, and held that "the Commission properly relied heavily upon legislative history" to resolve the issue.[13]

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[13] 685 F.2d at 1316-17, Pet. App. 9a-10a. The court's opinion simply adopts the Commission's mischaracterization of petitioners' interpretation.

On reviewing isolated excerpts from the "legislative history" material, however, the court found a less than compelling basis for decision:

> Although much of this material is weak, for the purpose of determining legislative intent, it is helpful and apparently all that is available.[14]

The court then held that it "must grant great deference" to the Commission's decision to interpret the words "new licensees" as if they included "original licensees" and affirmed Opinion 88. *See* 685 F.2d at 1318, Pet. App. 12a-13a.

A petition for rehearing and a joint suggestion filed on behalf of all investor-owned utility parties for *en banc* consideration were denied without opinion. *See* 693 F.2d 135, Pet. App. 83a.

REASONS FOR GRANTING THE PETITION

I. Whether Section 7(a) Of The Federal Power Act Provides A Municipal Preference Against Original Licensees Is A Substantial Federal Question That Has Not Been, But Should Be, Resolved By This Court.

There are currently at least eight relicensing proceedings before the Commission involving competition between a private original licensee and a municipal

[14] 685 F.2d at 1317-18, Pet. App. 12a. The court thus approved the Commission's heavy reliance upon legislative history which the court deemed "weak, for the purpose of determining legislative intent. . . ." 685 F.2d 1317, Pet. App. 12a. As discussed *infra* at 24-27, the court is simply wrong in its conclusion that the selected handful of excerpts from the legislative history noted in the court's opinion is "apparently all that is available." The court did not even mention, much less address, the extensive legislative history supporting the petitioners' interpretation, including a long history of consistent usage by Members of Congress of the term "new licensees" to exclude original licensees.

applicant.[15] According to the Commission, an additional 154 private licenses will expire between January 1, 1983 and December 31, 1993.[16] The decision below places municipal applicants in an extremely favorable position in each of those eight pending cases and in every future contested case. The privately-owned electric utilities which operated FERC-licensed major hydroelectric projects served some 43 million customers in 1980.[17] The Commission's decision imposes burdens upon, and threatens serious economic loss to, these private utilities and their customers.

A. The Decision To Apply The Municipal Preference Against Original Licensees Has A Significant Adverse Impact Upon The Investor-Owned Electric Utility Industry And Its Customers.

The purpose and importance of the Federal Water Power Act of 1920 is well understood by this Court.[18] The Court noted only last term that:

> The potential of water power as a source of electric energy led Congress [in the Federal Water Power

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[15] A table containing information on these pending projects is included in Pet. App. at 123a.

[16] Federal Energy Regulatory Commision, DOE/FERC-0011, *Federal Power Commission (Final) 1977 Annual Report* 51-57 (1978).

[17] *See id.*; Energy Information Administration, U.S. Dep't of Energy, DOE/EIA-0044(80), *Statistics of Privately Owned Electric Utilities in the United States 1980* 225-260 (1981); Federal Energy Regulatory Commission, FERC-0070, *Hydroelectric Power Resources of the United States* 70-119, 130-140, 149 (1980) [hereinafter cited as *FERC Hydroelectric Power Report*].

[18] *See, e.g.*, Chemehuevi Tribe of Indians v. FPC, 420 U.S. 395 (1975); Federal Power Comm'n v. Union Electric Co., 381 U.S. 90 (1965); Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955); First Iowa Hydro-Electric Coop. v. FPC, 328 U.S. 152 (1946).

> Act] to exercise its constitutional authority over navigable streams to regulate and encourage development of hydroelectric power generation "to meet the needs of an expanding economy." *FPC* v. *Union Electric Co.*, 381 U.S. 90, 99 (1965).

New England Power Co. v. *New Hampshire*, 455 U.S. 331, 340 (1982).

Since the FWPA's enactment in 1920, hydroelectric power has emerged as an important element of the domestic energy sector—one which contributes significantly to the economic welfare and security of a nation with a continuing dependence on foreign energy sources. By January, 1980, there were some 490 major hydroelectric generating projects, located in 32 states, under license to non-municipal, non-Federal entities.[19] These projects generated approximately 64.6 billion kilowatt hours of electricity in 1980[20]—enough electricity to meet the entire annual needs of approximately 7.3 million residences.[21] The estimated replacement cost of the facilities generating this energy is approximately $21.7 billion;[22] the estimated annual cost of replacing the elec-

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[19] *FERC Hydroelectric Power Report* at 70-119. This figure does not include minor hydroelectric projects—*i.e.*, hydroelectric projects with less than 2000 horsepower developed capacity. The Commission has exempted many such projects from Sections 14 and 15, the takeover and relicensing provisions of the Act, pursuant to Section 10(i), 16 U.S.C. § 803(i) (1976).

[20] *FERC Hydroelectric Power Report* at 70-119.

[21] The estimated average annual residential kilowatt hour use for 1981 was 8,772 kilowatt hours. "1982 Annual Statistical Report," *Electrical World* at 89 (March, 1982).

[22] The 490 projects have an aggregate developed capacity of approximately 22.8 million kilowatts. *FERC Hydroelectric Power Report* at 70-119, 149. The replacement cost of that capacity, in 1980

tric energy produced by these facilities is more than $1.0 billion.[23]

Because most viable sites for large hydroelectric projects have already been developed, a privately-owned utility that fails to obtain a new license for its project may be forced to replace its project with an expensive new thermal generating plant.[24] Moreover, subsequent to the decision below, the Commission staff has taken the position that the original licensee in such a situation is entitled to *no* compensation from a "new licensee" either for the cost of constructing a replacement plant, or for the increased cost of fuel used to operate the new plant.[25] The Act provides in Section 15(a) that a "new licensee," upon

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dollars, based on a cost of $950 per kilowatt, is approximately $21.7 billion. The $950 per kilowatt figure is based on projected costs for a 1.2 million kilowatt low-sulfur, sub-bituminous coal powerplant. Energy Information Administration, U.S. Dep't of Energy, DOE/EIA-0356/1 Vol. 1, *Projected Costs of Electricity from Nuclear and Coal Fired Power Plants* 26 (1982).

[23] This figure is based on the use of coal to replace the 64.6 billion kilowatt hours of average annual generation from the 490 major projects under license to non-municipal, non-Federal facilities, and is derived from U.S. Dep't of Energy, *Cost and Quality of Fuels for Electric Utility Plants*, Table 23 (July, 1982).

[24] Alternatively, the utility may attempt to purchase power to replace lost energy production. However, as a result of various municipal preference provisions for purchase of low-cost Federal power, only relatively expensive replacement power may be available to a privately-owned utility.

[25] *Pacific Power & Light Co.*, Initial Brief of Commission Staff (FERC Docket Nos. 935 and 2791) at 86-99 (filed January 14, 1983). In 1968, fuel costs of privately-owned utilities nationwide represented approximately 18 percent of the cost per kilowatt hour; 12 years later, in 1980, 37 percent of the total bills paid by ultimate customers was devoted to fuel expense. Energy Information Admin-

relicensing, shall pay the original licensee the "net" investment plus severance damages.[25] But if the payment to the original licensee based on net investment plus severance damages does not include compensation for either: 1) the vast difference between the cost of new capacity and the "net investment" in the existing facility; or 2) the difference between the fuel cost to operate a hydroelectric project—virtually zero—and the cost of fuel to operate the new capacity, then, as the Commission recognized, the compensation the original licensee would receive:

> could range from zero, to a substantial part of the cost of construction or acquisition many years ago when price levels were much lower than today, and *would be considerably less than the cost of building or otherwise acquiring new generating capacity today.*

Opinion 88 at 4, Pet. App. 18a (emphasis supplied).

Under Federal and State ratemaking statutes, these extraordinary cost impacts of such a takeover will be included in the investor-owned utilities' cost-of-service, and passed on to the utilities' customers. Thus, those customers who paid for the hydroelectric plants operated

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istration, U.S. Dep't of Energy, DOE/EIA 0044(80), *Statistics of Privately Owned Electric Utilities in the United States 1980* 23-24 (1981).

[25] "Net investment" is a cost-related price, defined at Section 3(13), 16 U.S.C. § 796(13) (1976). Severance damages are not defined but are discussed in Section 14(a), 16 U.S.C. § 807(a) (1976). The right of the Federal government, States and municipalities to acquire licensed projects by eminent domain is expressly reserved by Section 14(a). The price to be paid in the case of eminent domain, however, is "just compensation"—a value-related, rather than a cost-related price. Opinion 88 at 4, Pet. App. 18a.

by private utilities now face both the very real threat of inadequate compensation for the loss of their facilities, and the burden of paying for the construction and operation of any necessary replacement capacity.

Finally, transfer of these hydroelectric projects threatens to produce other serious economic disruption—impacting upon virtually all sectors of the public—such as that foreseen by the Senate Commerce Committee in 1968 when it noted that:

> [c]ontinuity of ownership and management is desirable to avoid possible interruption of service resulting from the severance of a project from an integrated system, the upsetting of existing tax patterns which are a substantial source of revenue to many communities, the dislocation of jobs, and other possible adverse results.

S. Rep. No. 1338, 90th Cong., 2d Sess. 3-4 (1968).

B. The Municipal Preference Provides Significant Competitive Advantages To Municipalities.

The municipal preference is a significant factor in every contest in which it applies for three reasons. First, the preference provides municipal applicants a unique statutory right to have their applications compared to private parties' applications for new licenses on the basis of an "equally well adapted" standard, rather than the "best adapted" standard.[27] Under the "best adapted"

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[27] Section 7(a) of the Act, 16 U.S.C. § 800(a) (1976), provides that:

> . . . in issuing licenses to new licensees under section 15 hereof the commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the commission *equally well adapted* . . . as between other applicants, the commission may give preference to the applicant the plans of which it finds and determines are *best*

standard competing applicants bear the same burden of demonstrating that their plans will *best* serve the public interest, and in selecting one application over another, the Commission must articulate reasons for finding the successful applicant's plans to be superior. Under Opinion 88, on the other hand, a municipal applicant need not demonstrate that its takeover of the project will better serve the public interest than would continued operation by the original private licensee; it need only demonstrate that its plans will serve the public interest equally well. Consequently, the private original licensee, if it is to retain its license, would be required to demonstrate that its proposal to continue operation of the project is *superior* to the municipality's proposal.[28] In addition, application of the "equally well adapted" standard rather than the best adapted standard allows the Commission to resolve difficult questions concerning the merits of competing proposals without articulating a finding that one applicant will *best* serve the public interest.[29]

Second, the preference entitles a municipality to amend an inferior application in order to meet the "equally well adapted" standard. The statute provides a prefer-

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adapted to develop, conserve, and utilize in the public interest the water resources of the region. . . .

(Emphasis supplied.)

[28] Subsequent to the Eleventh Circuit's decision, the Commission's staff has taken the position that the private original licensee must show that transfer of the project to a competing municipal applicant would produce "substantial," "long-term," adverse impacts on the public interest. *Pacific Power & Light Co.*, Initial Brief of Commission Staff (FERC Docket Nos. 935 and 2791) at 8 (filed January 14, 1983).

[29] *Cf.*, City of Dothan, Alabama v. FERC, 684 F.2d 159, 165-69 (D.C. Cir. 1982) (Mikva, J., dissenting).

ence for the plans of a municipality initially found to be "equally well adapted" with the proposals of other license applicants, or which "shall within a reasonable time to be fixed by the Commission be made equally well adapted." Section 7(a) of the Act, 16 U.S.C. § 800(a) (1976). The Commission's relicensing regulations, 18 C.F.R. Part 16 (1982), do not spell out the method of implementing this "second-bite." However, the analogous regulations governing permits and initial licenses provide that:

> the Commission will inform the municipality or state of the specific reasons why its plans are not as well adapted and afford a reasonable period of time for the municipality or state to render its plans at least as well adapted as the other plans.

18 C.F.R. § 4.33(g)(4) (1982).

Moreover, because the Commission's policy is to accept for filing thoroughly plagiarized competing license applications, the preferred municipal applicant may photocopy or otherwise adopt as its own the superior elements of the original licensee's application in exercising its "second-bite" opportunity.[30]

Third, the preference acts as a "tie-breaker"—*i.e.*, Section 7(a) requires that in cases of "equally well adapted" plans, the Commission give preference to municipalities. This "tie-breaker" provision mandates that municipal applicants win all "ties."

In sum, the "equally well adpated" test associated with the preference creates the possibility of a "tie" and places

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[30] *Tuolumne Regional Water District*, Project No. 4309-001, 19 F.E.R.C. (CCH) ¶ 61,132 (May 10, 1982) (providing that the Commission will permit the verbatim duplication of competing proposals and alluding to the possibility of a separate copyright infringement action under the copyright laws).

the burden of proof upon the private applicant; the "second-bite" provision of the statutory preference encourages the finding of a tie in such proceedings; and the "tie-breaker" assures that municipal applicants win all such ties.

II. THE COMMISSION IGNORED THE LANGUAGE OF THE STATUTE, THREE PRINCIPLES OF STATUTORY CONSTRUCTION, AND THE LEGISLATIVE HISTORY OF THE TERM "NEW LICENSEES."

Petitioners contend that the meaning of "new licensees" as that term is used in Section 7(a) excludes "original licensees." This interpretation is based on the consistent usage of the term "new licensees" in Sections 15 and 22 and throughout extensive legislative debates.

To reach its contrary interpretation, the Commission contravened the most basic canons of statutory construction. The Commission held that the term "new licensees" as used in Section 7(a) encompasses both "new licensees" and "original licensees." Opinion 88 at 10-11, Pet. App. 24a-25a. Quite obviously, the Commission could not rely on the language of the Act to reach this result. Rather, the Commission interpreted the term "original licensee" inconsistently within the statute, dismissed an explicit statutory cross-reference, denied meaning to the key phrase in issue, and failed even to mention the clearest evidence of legislative intent which can be gleaned from the years of Congressional debate—the Congress' consistent use of the term "new licensees" to exclude "original licensees."

A. The Starting Point In Statutory Construction Is The Language Itself; The Commission Began With The Legislative History.

The most basic tenet of statutory construction is that the "starting point in . . . the construction of the statute is the language itself." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring); *see Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976). The Commission began, instead, with the legislative history, reached its conclusion, and then attempted to rationalize its result.

B. The Terms Of A Statute Are To Be Interpreted Consistently Throughout; The Commission Refused To Do So.

It is an equally well-settled principle of statutory interpretation that terms or phrases used in different parts of a statute are to be interpreted consistently, unless there is clear evidence that Congress intended them to be read otherwise. *Atlantic Cleaners and Dyers, Inc.* v. *United States*, 286 U.S. 427 (1932); *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 387 n.5 (1980) (Stewart, J., dissenting).[31] As the Court noted in *Atlantic Cleaners*, it is a "natural presumption that identical words used in different parts of the same act are intended to have the same meaning." 286 U.S. at 433. Reference to the use of a term in one part of a statute is

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[31] There, Justice Stewart noted:

> "Nonforfeitable" is used in Title I [of ERISA] as a term of art. Congress used the same word in critical portions of Title IV. Had it intended "nonforfeitable" to carry one meaning in Title I and another in Title IV Congress would presumably have said so, *particularly since the two Titles were considered and enacted in tandem and were meant to function as an interrelated system.*
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> . . .

446 U.S. at 387 n.5 (emphasis supplied).

often an important tool in discovering its meaning in other places in which it is used. *See United States* v. *Cooper Corp.*, 312 U.S. 600, 606 (1941). Reference to Section 15 to determine the meaning of "new licensees" as used in Section 7(a) is particularly appropriate, in light of the statutory cross-reference from Section 7(a) to Section 15.

Yet in order to justify its conclusion, the Commission defined the term "new licensees" in Section 7(a) in a way which is fundamentally different from its meaning in Section 15 and in every other place in which it appears in the statute. This result would be difficult enough to justify if the words appeared in unrelated provisions of the Act. It simply cannot be supported in this case where the term "new licensees" appears in Section 7(a) *in the very phrase which refers specifically to Section 15 of the Act.*

The term in issue here, "new licensees," appeared in Sections 7, 15 and 22 in the 1920 Act and subsequently was used in the 1968 amendments in Sections 7(c) and 15(b). There is no dispute that the term "new licensees" intentionally excludes "original licensees" in Sections 7(c), 15(a), 15(b) and 22. Thus the Commission's conclusion, which is supported by no legitimate analysis of the language of the Act, results in an interpretation of the term "new licensees" in Section 7(a) which is aberrational and contrary to its usage in every other place in which it appears in the Act.

In an obvious attempt to find statutory ambiguity where none exists, the Commission concluded that (Opinion 88 at 46, Pet. App. 59a-60a):

> The term "original licensee", when used alone in Section 8, does not have the same meaning as the

same term when used in correlation with "new licensee" in Sections 15(a) and 22. And since it doesn't, there is no reason to require the term "new licensees", when used alone in Section 7(a), to have the same meaning as the term "new licensee" when used in correlation with "original licensee" in Sections 15(a) and 22.

The presumption favoring consistent interpretation, the express cross-reference from Section 7(a) to Section 15, and the consistent usage of the term "new licensee" every place it appears in the statute and legislative history all contradict the Commission's conclusion that there is "no reason" to interpret the term "new licensees" consistently.[32]

C. Statutory Language Is To Be Construed So As To Give Effect To All Words; The Commission Treated The Phrase "To New Licensees" As Mere Surplusage.

It is a time-honored rule of statutory construction that statutes are to be construed to give effect to every word used and in such a way that no clause or word is left without meaning. *See, e.g., United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955); *Market Co.* v. *Hoffman*, 101 U.S. 112, 115-16 (1879); 2A Sutherland, *Statutory Construction* § 46.06 (C. Sands 4th ed. 1973).

Section 7(a) as enacted by Congress provides that there is to be a preference in favor of States and municipalities "in issuing licenses to new licensees under section 15. . . ." The Commission's interpretation applies the municipal preference against *all* licensees in proceedings under Section 15, treating the phrase "to new licensees" as though it were not there. That interpretation deserves

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[32] Moreover, the term "original licensee" has the *same* meaning in Section 8 as it has in Section 15(a) and 22.

careful scrutiny because, as this Court stated in *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979):

> In construing a statute we are obliged to give effect, if possible, to every word Congress used.

D. Throughout The Legislative History The Term "New Licensees" Was Used Consistently To Exclude "Original Licensees"; The Commission Ignored This History.

The term "new licensee" appears at least 137 times during congressional debates on the Federal Water Power Act in 1919 and 1920.[33] *In each case the term is used to refer to entities other than original licensees.* This repeated consistent usage of the term makes certain that it had a clear meaning and that Congress never used the term to include original licensees.

The Commission ignored this compelling evidence concerning the Congressional intent behind the term "new licensee," preferring to rely upon a wide assortment of admittedly "opaque" general historical materials to construct a result-oriented theory of the Wilson Administration's general desires regarding the municipal preference. *See* Opinion 88 at 17-31, Pet. App. 30a-44a.

III. THE COURT OF APPEALS FAILED TO TEST THE THOROUGHNESS, VALIDITY AND CONSISTENCY OF THE COMMISSION'S REASONING.

The court of appeals failed to correct the Commission's serious errors of statutory construction. Rather than apply any of the settled canons of statutory construction—which may have been foreign to the Commission but constitute basic tools of the judiciary—the

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[33] *See* 59 Cong. Rec. 245-46 (1919); 59 Cong. Rec. 1042-1048, 1105, 1108, 1433, 1435-37, 1441-43, 1472-73, 1483, 6520, 6522, 6524, 7224-25, 7779 (1920). *See, e.g.*, Pet. App. 125a-135a.

court merely parroted the Commission's *ad hoc* approach in summarily holding that:

> Like the Commission, we easily overcome the plain meaning hurdle. The fact that the public companies here have accorded one reasonable interpretation to the words "new licensees" by relying on its [sic] context in section 7(a), and that private interests have accorded a different but reasonable meaning to the phrase by following the reference in section 7(a) to section 15 suggests that the meaning of the term "new licensees" is sufficiently ambiguous to merit resort to legislative history.

685 F.2d at 1316, Pet. App. 9a.

This paragraph is remarkable in several respects. *First*, the court apparently believed that the mere fact that opposing lawyers disagree on the meaning of a statutory term is enough to render the statute ambiguous. *Second*, the court's conclusion, although central to its disposition of the case, is preceded by no analysis. *Third*, the well-established principle that the language of a statute is the best guide to determining congressional intent is treated by the court as a "hurdle" to be "overcome," rather than a legal principle to be applied as a matter of well-established case law. *See CBS, Inc.* v. *FCC*, 453 U.S. 367, 377 (1981); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring). *Fourth*, The court's language is virtually a direct quotation from the Commission's Opinion.[34]

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[34] Opinion 88 at 42, Pet. App. 55a, reads:

> Turning first to the words chosen by Congress, the fact that the public power interests have been able to provide one reasonable interpretation to "new licensees" without reference to extrinsic construction aids, chiefly through its context in Section 7(a), and the further fact that the private power interests attribute a

Finally, the circularity of the court's reasoning in the key paragraph deserves special emphasis. The court permits an interpretation derived solely from legislative history—the public power parties' interpretation—to establish the very ambiguity that is said to warrant resort to the legislative history.[35]

The court's discussion of legislative history is equally devoid of analysis. The court ignored entirely the consistent usage of the term "new licensees" throughout the Congressional debates preceding enactment of the FWPA.[36] Instead, it cited a few isolated excerpts relied upon by the Commission and erroneously claimed that those materials "apparently" constituted all existing legislative history. The fact is that the legislative history contains much more material—material more relevant and illuminating than that relied upon by the court. Both the Commission and the court have characterized the general legislative history materials they rely upon as "opaque" and "weak." Indeed, those materials support petitioners' interpretation at least as well as they support the Commission's. More important, the repeated and consistent usage of the term "new licensees" throughout the legislative history—although ignored entirely by the Commission and court of appeals—constitutes clear and compelling evidence supporting only one interpretation,

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different meaning by following the reference in Section 7(a) to Section 15 . . . suggest that there is sufficient ambiguity as to the meaning of "new licensees" that it would be appropriate to turn to the legislative history.

[35] The court incorrectly suggested that the basis of the public power parties' interpretation is the "context in section 7(a)." As the Commission correctly noted (Opinion 88 at 13, Pet. App. 26a):

> The public power interests focus their argument on the legislative history of Section 7(a). . . .

[36] *See supra* at 24.

i.e., Congress used the term "new licensees" consistently to *exclude* "original licensees."

The apparent explanation for the court's cursory review of the important Federal question before it is its belief that it was compelled to grant "great deference" to the Commission. 685 F.2d at 1318, Pet. App. 12a. The court *adopted* but *never tested* the Commission's reasoning, and merely substituted deference for a thorough, independent analysis of the reasonableness of the Commission's interpretation. This Court has recently reiterated its admonition from *Skidmore* v. *Swift & Co.*[37] that:

> the thoroughness, validity and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's ruling.

Federal Election Comm'n v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1982). The Commission's interpretation, which is neither contemporaneous with enactment of the statute, longstanding, consistent with prior administrative interpretation, nor supported by valid reasoning, simply fails by the widest of margins to meet the *Skidmore* test.

Unless this Court grants *certiorari*, the Commission's erroneous interpretation of an extremely important provision of the Federal Power Act will have been adopted without meaningful judicial review.

IV. APPLICATION OF THE MUNICIPAL PREFERENCE SOLELY AGAINST "NEW LICENSEES" PRODUCES A REASONABLE RESULT CONSISTENT WITH THE LANGUAGE AND LEGISLATIVE HISTORY OF THE ACT.

The sole issue in this proceeding is whether the municipal preference applies against an original licensee that is

[37] 323 U.S. 134, 140 (1944).

neither a State nor a municipality.[38] Petitioners contend that the municipal preference does not so apply. Petitioners' interpretation produces only one result—it precludes application of the municipal preference against private original licensees.[39]

Neither the Commission nor the court has found this result to be unreasonable. The Commission and the court of appeals, however, attributed other results to petitioners' interpretation which it does not produce, and then found those results absurd. For example, the court of appeals stated that under the petitioners' theory, "the only time a license holder would fail to obtain reissuance of a license would be when the [project] is not profitable." 685 F.2d at 1316, Pet. App. 10a. That is incorrect. It is important to recognize that under the petitioners' theory, the original licensee will in fact "fail to obtain reissuance of a license" for *any* project if it is unable to show that its plan is "best adapted." Conversely, a municipal or other competitor of an original licensee will obtain the new

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[38] The Commission Order of May 3, 1979, was quite clear in establishing the scope of this proceeding (Order at 2, Pet. App. 119a (emphasis supplied)):

> Our inquiry here is *solely*—assuming a particular competing applicant on relicensing is a "municipality," and assuming its plans are or are made equally well adapted as those of a *non-municipal "original licensee"*—whether that municipality has a preference over that non-municipality.

[39] The Commission and the court considered the additional question whether a *municipal original* licensee is entitled to a preference against *new private* applicants. That question clearly is *not* within the scope of this case. Petitioners do not contend that a municipal original licensee has no preference and their interpretation does not produce that result. Moreover, it appears from the legislative history that Congress never considered that issue and, to the best of petitioners' knowledge, a contest between a municipal original licensee and a private new licensee has never arisen.

license if it demonstrates that its plan is "best adapted" to develop, conserve, and utilize in the public interest the water resources of the region. Meanwhile, the municipal preference at relicensing has a significant role. If two or more applicants challenge the original licensee in the relicensing proceeding, Section 7(a) will provide a municipal competitor the three-part statutory preference discussed *supra* at 17-20, against all private "new licensees." As a result, the municipal applicant will often prevail over the private new applicants.[40]

Thus, as between the original licensee and a new municipal applicant, the "best adapted" test applies and it is the public interest which receives the sole preference. There is no advantage or preference for either applicant—instead, they are on an equal footing. The applicant whose plans are best adapted to serve the public interest, as determined by the Commission on a case-by-case basis, will be offered the license.

The language of the Act and its legislative history compel the conclusion that this was the policy agreed upon as Congress finally concluded years of debate and approved the Federal Water Power Act.

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[40] This is consistent with the Commission's application of the municipal preference in the case of issuing initial licenses where a preliminary permit has been issued. In such a case, the Commission applies the municipal preference against all private applicants other than the permittee, while it applies a different standard as between the municipal applicant and the permittee. *See* 18 C.F.R. 4.33(g), (h) (1982).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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